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No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEWELL WEST a/k/a
JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

QUESTION PRESENTED

Does a State's civil procedure violate the due process clause of the Fourteenth Amendment of the United States Constitution when said procedure allows service by publication notice to be effective and stand against an out of state Defendant notwithstanding that the Plaintiff learned of the actual whereabouts of Defendant prior to the taking of default judgment but proceeded thereunder without notice to said Defendant?

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DOES A STATE'S CIVIL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN SAID PROCEDURE ALLOWS SERVICE BY PUBLICATION NOTICE TO BE EFFECTIVE AND STAND AGAINST AN OUT OF STATE DEFENDANT NOTWITHSTANDING THAT THE PLAINTIFF LEARNED OF THE ACTUAL WHEREABOUTS OF DEFENDANT PRIOR TO THE TAKING OF DEFAULT JUDGMENT BUT PROCEEDED THEREUNDER WITHOUT NOTICE TO SAID DEFENDANT? 9
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, entered the 13th day of October, 1982.

OPINIONS BELOW

The Supreme Court of the State of Oklahoma assumed jurisdiction on April 28, 1980 upon petitioner filing an appeal and entered its opinion on the 13th day of October, 1982, denying said appeal.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was pronounced as aforesaid on the 13th day of October, 1982, the jurisdiction of this Court is invoked under Title 28, §2101(c) of the United States Code.

Article 2, §7 of the Constitution of Oklahoma provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Under Title 12, §952 of the Oklahoma Statutes, the following provision places the appellate jurisdiction of all judgments of District Courts of the State of Oklahoma with the Supreme Court of Oklahoma, to-wit:

> "(a) The Supreme Court may reverse, vacate or modify judgments of the District Court for errors appearing on the record, and in the reversal of such judgment may reverse, vacate or modify any intermediate order involving the merits of the action or any portion thereof."

Therefore, the judgment as issued on October 13, 1982, was a decision by the highest state tribunal having jurisdiction in such matters.

QUESTION PRESENTED

Does a State's civil procedure violate the due process clause of the Fourteenth Amendment of the United States Constitution when said procedure allows service by publication notice to be effective and stand against an out of state Defendant notwithstanding that the Plaintiff learned of the actual whereabouts of Defendant prior to the taking of default judgment but proceeded thereunder without notice to said Defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the due process clause applicable to the States through the Fourteenth Amendment. See *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. The Fourteenth Amendment reads:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Procedural History of the Case

Respondent filed a petition for divorce from petitioner in Osage County, State of Oklahoma, District Court on 16th of January, 1979. On that same date Respondent filed an affidavit to obtain service by publication.

Notice by publication was issued and published in the Pawhuska Journal-Capitol for three consecutive weeks and required an answer to be filed by March 2, 1979.

On March 7, 1979, a decree of divorce by default was entered in favor of respondent and against the petitioner. The District Court found the publication notice to have been proper.

On April 16, 1979, petitioner filed a motion to vacate the decree of divorce. The motion was amended on May 21, 1979. On July 31, 1979, after oral argument before the District Court, the matter was taken under advisement. Each party filed briefs and on April 2, 1980, the District Court denied and overruled petitioner's motion to vacate.

On April 28, 1980, a timely appeal was filed with the Supreme Court of the State of Oklahoma again raising the issue of lack of due process in the publication notice. On October 14, 1981, the appeal was assigned by the Supreme Court of the State of Oklahoma to the Temporary Court of Appeals.

On April 27, 1982, the Temporary Division No. 63 of the Court of Appeals, State of Oklahoma, affirmed the decision of the District Court. The Temporary Division No. 63 of the Court of Appeals held there was a distinction between cases where a respondent knew the petitioner's whereabouts

before he attempted service by publication, and where the plaintiff discovered defendant's whereabouts after filing. Only in the former instance, the Temporary Division No. 63 of the Court of Appeals held, could publication notice be said to be improper.

On May 4, 1982, petitioner filed a timely petition for rehearing, which was denied by Temporary Division No. 63 of the Court of Appeals on August 20, 1982, without comment.

On August 31, 1982, petitioner filed a timely petition for Certiorari with the Supreme Court of the State of Oklahoma, which was denied on October 13, 1982 without comment. This decision was then a final judgment of the State of Oklahoma's court of last resort. See Oklahoma Const., Art. 7, §1; 12 Okla. Stat. §952.

II. The Facts Material to the Questions Presented

During August, 1978, petitioner, JEWEL WEST removed herself from the home of the parties because of irreconcilable differences with the respondent, as to the circumstances surrounding which the petitioner has not been allowed to testify. The parties had been living as man and wife for nearly sixteen years and had one child, BOYD BARON WEST, who was thirteen and nearing fourteen years of age. On 6th of January, 1979, respondent filed a divorce petition which alleged:

> "4. That on or about the 18th day of August, 1978, the Defendant, without any notice to Plaintiff, abandoned the Plaintiff and removed herself from their home and that since that date to the present date, the Plaintiff has not seen the Defendant and has absolutely no knowledge as to her whereabouts other than the fact that at

one time he had information that she may have been in the State of California with no knowledge as to her address or present location . . ."

That same day an affidavit for the obtaining of service by publication was filed which alleged:

"Plaintiff and affiant herein further states that as set forth in said petition on file herein that the Defendant abandoned and removed herself from the residence of the parties on or about August 18, 1978, and that since that date the Plaintiff has had no knowledge as to her whereabouts although he had some information that she may have been at one time located in the State of California but that he had no specific address and no knowledge as to her whereabouts. Affiant further states that he made diligent inquiry with her friends and relatives and all sources available to determine her location or whereabouts but that said Defendant has purposely concealed her whereabouts from the Plaintiff since her departure in August, 1978, and that by reason thereof it is impossible to obtain service of summons upon said Defendant either within or without the State of Oklahoma and that the Plaintiff and affiant is entitled to obtain service of summons and notice upon her by publication as provided by law."

On January 26, 1979, one week after the respondent filed his petition and affidavit for notice by publication the petitioner wrote him a five page letter providing respondent with her address. That letter expresses petitioner's desire to work out a divorce settlement, requests that the respondent write her back at the address provided, states that when she comes back to town she would like to see her son, and states that petitioner felt it would be better if respondent went ahead and filed for divorce.

On February 5, 1979, petitioner sent the respondent another letter, this time by certified mail, stating that she had

talked to Bruce Gambill, an attorney in Pawhuska and that he had informed her that she should provide plaintiff with her mailing address so that she could receive the necessary papers. This letter ends with the petitioner requesting that respondent contact her in regard to this matter. According to petitioner's testimony she had not seen any notice in the Pawhuska paper but her mother had. Her mother did not know what kind of notice it was, only that both their names were mentioned. So petitioner had contacted Gambill who advised her to provide her present address to her husband so she could receive the necessary papers.

The answer date of March 2, 1979, was reached and the respondent had never responded to the letters of petitioner requesting more information on the divorce. In fact, the respondent had said nothing to the petitioner about a petition being filed for divorce and nothing about the fact that a default judgment would be taken against her on March 2, 1979. The respondent knew the address and location of the petitioner within one week after the filing of the petition, and yet made no attempt to reach her by mail or to inform her that a petition had been filed seeking a divorce from her. The divorce decree was entered on March 7, 1979, and by the provisions thereof the reason for the respondent's lack of communication with the petitioner becomes apparent.

As part of the findings of the Court in that decree it was stated:

> "The Court further finds that based upon the evidence given in open Court that Defendant herein did on or about the 18th day of August, 1978, remove herself from the home of the parties hereto without any advance notice to the Plaintiff or the minor child of the parties hereto and *that since said date the Plaintiff has not known her actual whereabouts* or location other than the fact that he was aware that she may have been in

> the State of California. The Court further finds based upon Plaintiff's Exhibit 1 as introduced in this Court that the said Defendant did on 5 February, 1979, write a letter to the Plaintiff advising Plaintiff that she was aware of the notice by publication which had been previously published in accordance with the provisions of law and that she had made contact with a law-firm in Pawhuska for the purpose of representing her and advising her but that said Defendant had made no appearance or filed any pleadings in this action nor had the Court been contacted by any attorneys representing said Defendant or had any pleadings been filed by any attorneys representing said Defendant and further based upon the statement of Plaintiff's counsel made in open Court that the counsel for Plaintiff had not been contacted by the Defendant or contacted by any attorney or any other person purporting to represent the said Defendant."
> [Emphasis added.]

An examination of this letter dated February 5, 1979, reflects that the above quoted portion of the decree of divorce is patently false. The letter states that the petitioner had contacted a lawfirm but no where states that an attorney had been retained to represent the Defendant's interest. Further the letter states in two places the mailing address of the petitioner. It is apparent from an examination of the letter and the above quoted portion of the decree of divorce that respondent carefully avoided stating whether or not he knew the present whereabouts, that is the whereabouts of the petitioner on March 7, 1979, because he did in fact know her whereabouts. Rather then explaining to the Court that he knew the petitioner to be still waiting for the copy of the "necessary papers" which she had requested him to send to her if he did file for divorce, instead respondent used the February 5, 1979, letter to induce the Court into entering a

decree by default. Respondent led the Court to believe that because petitioner had contacted a lawfirm that this meant she had retained counsel to represent her in the divorce and therefore she was aware of the divorce proceedings.

The decree provides that the respondent receive care, custody and control of the son of the parties, BOYD BARON WEST. The decree further provides that the property acquired by the parties be divided so that the respondent received all the marital estate, same being substantial, except those items of personal property which petitioner took with her and a bank account which was already in her name.

III. Federal Question of Due Process of Law Raised in All Courts Below

The question of the violation of petitioner's right to due process of law was raised at all stages of the Courts below, commencing with the District Court, as follows:

(1) By Motion to Vacate in the District Court of Osage County;
(2) By appeal to the Supreme Court of the State of Oklahoma;
(3) By Petition for Rehearing to the Temporary Division No. 63, Court of Appeals, State of Oklahoma;
(4) By Petition for Certiorari to the Supreme Court of the State of Oklahoma.

In each Court, the Constitutional question of due process was continuously urged and preserved.

ARGUMENT

DOES A STATE'S CIVIL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN SAID PROCEDURE ALLOWS SERVICE BY PUBLICATION NOTICE TO BE EFFECTIVE AND STAND AGAINST AN OUT OF STATE DEFENDANT NOTWITHSTANDING THAT THE PLAINTIFF LEARNED OF THE ACTUAL WHEREABOUTS OF DEFENDANT PRIOR TO THE TAKING OF DEFAULT JUDGMENT BUT PROCEEDED THEREUNDER WITHOUT NOTICE TO SAID DEFEENDANT?

From the facts hereinabove stated it is apparent that the method of notification employed by the respondent was not reasonably calculated to give petitioner knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction over her and allow her an opportunity to be heard. These minimum requirements for due process of the law as stated in the 14th Amendment of the United States Constitution, are discussed in the 1950 United States Supreme Court case of *Mullane vs. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Subsequently, this matter was also decided by the Oklahoma Supreme Court in the 1968 case of *Bomford vs. Socony Mobil Oil Co.*, 44 P.2d 713 (Okl. 1968). In that case at page 718 it was stated:

"The general rule that emerges from *Mullane* and

subsequent cases is simple: A state can not invest itself with, and exercise through its court, judicial jurisdiction over a person in a proceeding which may directly and adversely effect his legally protected interest, unless a method of notification is employed *which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner* of the attempted exercise of jurisdiction and an opportunity to be heard." [Emphasis added]

At page 719 of that decision the Court stated:

"The Court is bound to take notice of the limits of its authority. It is its right and duty to make an examination into its jurisdiction, whether raised by pleadings or suggested by counsel or not, and to determine its power to entertain the cause. *If the Court finds that any stage of the proceeding that it is without jurisdiction, it is its duty to take proper notice of the defect* by staying the proceedings, dismissing the cause, or by other appropriate action.' [Emphasis added]

(Citing 21 C.J.S. Courts 175 §114.) Also at page 719 of Bomford, supra, the Court stated:

"Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise the Defendant of the pendency of an action."

(Citing *Riverside & Dan River Cotton Mills vs. Menefee,* 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915). See also *Ross vs. Thompson,* 174 Okl. 183, 50 P.2d 385 (Okl. 1935); *Martin vs. Bastion,* 424 P.2d 1 (Okl. 1967); *Copas vs. Reents,* 365 P.2d 983 (Okl. 1961); and *Cravens vs. Corporation Commission,* 613 P.2d 442 (Okl. 1980).

As stated in *Mullane,* supra, at page 874:

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed

> must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

At the hearing on petitioner's Motion to Vacate the decree in this case, the trial court stated, . . .

> "I have one problem Mr. Wilson which is of concern to me. Perhaps I am defining an issue which, in my humble way of thinking is paramount . . . we have here - and I don't believe I have heard any cases cited today yet which illuminate this, a publication notice which is in the file. Thereafter a publication notice is a letter giving the address. Do you see my problem gentlemen?"

The factual situation surrounding the *Bomford Case,* supra, involved a plaintiff not exercising due diligence in locating the address for the defendant prior to utilizing publication notice. In the petitioner's case the respondent not only knew the whereabouts of the petitioner, he intentionally misled the Court when on the date for the default judgment he failed to state that he was aware of the petitioner's whereabouts. See Antieau, 1 Modern Const. L. §7:10, p. 540; *Copas vs. Anglo-American Provision Co.,* 73 Mich. 541, 41 N.W. 690 (Mich. 1889), observing that most state appellate courts refuse to allow trial court's to exercise jurisdiction where it has been obtained by fraud of the plaintiff. If due process requires a plaintiff to make reasonable efforts to determine a defendant's whereabouts prior to taking a judgment by publication notice, certainly then a violation of the defendant's due process has occurred when the plaintiff actually knows the whereabouts of the defendant and yet obtains default judgment. As stated in *Mullane,* supra:

> "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself to appear or default, acquiese or contest." (70 S.Ct. at 657)

The Plaintiff had an affirmative duty to report to the Court once he was apprised of the petitioner's whereabouts. Especially when the petitioner had requested the divorce papers and had provided respondent her address, it would have been minimal effort to have mailed her a copy of his petition and notice of hearing. Instead the respondent continued to lead the Court into believing that those efforts which respondent had made prior to learning of petitioner's address on January 26, 1979, were in fact still non-productive. In a similar case, *Myers vs. Myers,* Okl. 240 P.2d 442 (Okl. 1952), the plaintiff was shown to have served the defendant by publication notice even though he had corresponded with her both before and after the default decree was entered and her exact street address was well known to him. In that case, the Court affirmed the trial Court's vacation of the decree once this fact was brought to the trial court's attention. In the case of *Johnson vs. Daniel,* 569 P.2d 981 (Okl. 1977), the Court stated,

> "Where names and addresses of adverse parties are known or are easily ascertainable, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under Federal or Oklahoma Constitutions. All sources must be exhausted in a meaningful pursuit of information as to the defendant's whereabouts."

Also see Schroeder vs. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255 (1962), *Citizens and Southern National Bank vs. Auer et al.,* 514 F.Supp. 631 (D.C. Tenn. 1977); *Robinson vs. Hanrahan,* 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed2d 47 (1970).

Here, the respondent did not have to exhaust all sources but rather had information as to the petitioner's whereabouts readily available one week after the petition for divorce was

filed. However, when it comes to the default judgment, the respondent chose to act as if it had never obtained that information.

In the case of Rau vs. Cavenaugh, 500 F.Supp. 204 (D.C. S.Dak., 1980), where in foreclosure proceedings the plaintiff served the defendants' process by constructive notice published in the local paper, the Court held that since previous papers had been served the defendants by hand delivery and same worked no undue hardship on the plaintiffs, to ignore this effective means of notice was improper.

In the case of *McDonald vs. Mabee,* 243 U.S. 90, 61 L.Ed. 608, 37 S.Ct. 343 (1917), this Court, through Justice Holmes, once ruled that the best possible form of substituted service must be used, if personal service is not made within the jurisdiction. Justice Holmes stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." The Court should be recalled to this standard.

Where an honest effort has not been made to obtain the information required for publication notice, the judgment rendered by the Court on the basis of such notice is void for lack of jurisdiction over the Defendant. See *Mullane vs. Central Hanover Bank & Trust Co.,* supra; *Faulkner vs. Kirkes,* 276 P.2d 264 (Okl. 1954); *Grover vs. Locke,* 279 P.2d 322 (Okl. 1955); *Locke vs. Baskett,* 311 P.2d 219 (Okl. 1957); 62 AmJur. 2d, Process, 904, §118. The same should be true both where the plaintiff fails in his due diligence prior to the affidavit for service by publication and after its filing but before default judgment is entered. In the *Faulkner Case,* supra, the plaintiff carefully avoided learning the defendant's address even though he knew a

banker who had that address. In *Ross vs. Thompson,* 174 Okl. 183, 50 P.2d 385 (Okl. 1935), the plaintiff by exercising "the slightest diligence" could have obtained the defendant's addresses from county records or the agency who rented the house involved in the lawsuit. Considering the above circumstances respondent cannot claim to have made an honest effort to notify the petitioner of the proceedings pending against her. The default judgment should therefore be vacated.

PRAYER

WHEREFORE, petitioner WEST respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Oklahoma, and that the decision therein be reversed and remanded, so that the petitioner may be accorded her due process rights.

Respectfully submitted

/s/ Jack Duane Heskett

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/s/ Frederick Scott Esser

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 7th day of January, 1983, a true copy of the above and foregoing instrument was mailed to:

Robert W. Wilson
KANE, KANE, WILSON & MATTINGLY
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with postage prepaid.

/s/ Rick Esser